THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VICTOR M. LEWIS AND DAVID A. LEWIS

Appeal No. 95-2638
Application 08/022,174[1]

ON BRIEF

Before WINTERS and WILLIAM F. SMITH, Administrative Patent Judges, and McKELVEY, Senior Administrative Patent Judge.

WINTERS, Administrative Patent Judge.

DECISION ON APPEAL

This appeal was taken from the examiner's decision rejecting claims 1 through 9 and 14 through 17, which are all of the claims remaining in the application.

[1]Application for patent filed February 25, 1993.

Claims 1 and 6, which are illustrative of the subject matter on appeal, read as follows:

> 1. Quick cooking dehydrated vegetable pieces having incorporated therein sodium chloride at a concentration of at least 2% and an alkali metal carboxylate at a concentration of 1 to 4%, said concentrations being by weight of the quick cooking dehydrated vegetable pieces.
>
> 6. A process of incorporating a mixture of sodium chloride and an alkali metal carboxylate in quick cooking dehydrated vegetable pieces at concentrations of at least 2% sodium chloride and 1 to 4% alkali metal carboxylate by weight of the vegetable pieces comprising partially dehydrating the vegetable pieces to the extent wherein the residual moisture content is between 10% and 45%, adding to the partially dehydrated pieces a predetermined quantity of a solution containing said sodium chloride and alkali metal carboxylate at said concentrations, the quantity of said solution being such that it is totally absorbed by the vegetable and thereafter dehydrating the vegetable pieces to a predetermined moisture content.

The references relied on by the examiner are:

Bevan et al. (Bevan)	4,088,790	May 09, 1978
Lewis et al. (Lewis)	4,447,460	May 08, 1984
Lioutas	4,832,969	May 23, 1989

The appealed claims stand rejected as follows: (1) claims 1 through 5 under 35 USC § 102(b) as anticipated by Lioutas; (2) claims 1 through 9 and 14 through 17 under 35 USC § 103 as unpatentable over the combined disclosures of Lioutas, Lewis,

and Bevan.

On consideration of the record, including appellants' brief (paper no. 13) and the examiner's answer (paper no. 14), we reverse both prior art rejections.

35 USC § 102(b)

For a prior art reference to anticipate in terms of 35 USC § 102, every element of the claimed invention must be identically shown in a single reference. In re Bond 910 F.2d 831, 832, 15 USPQ2d 1566, 1567 (Fed Cir. 1990). That is not the case here.

Lioutas discloses dried green vegetables characterized by superior color retention and a method for their preparation. To achieve the dried green vegetables of Lioutas, the vegetables are infused with about 10% to 60% by weight of water activity controlling solutes and with about 50 to 200 ppm magnesium. The vegetables are also infused with an alkaline buffer system, generally comprising about 0.1% to 3.0% of the infusion solution (Lioutas, column 9, lines 27 through 34). In Table 2, Lioutas sets forth a number of

preferred alkaline buffer systems including, *inter alia*, citric acid/sodium citrate (col. 9, lines 15 through 25).[2]

The examiner's position to the contrary, notwithstanding, we find that Lioutas does not clearly and unequivocally disclose dried green vegetables having incorporated therein sodium citrate at a concentration of 1 to 4% by weight. First, no reference is made to the percentage of sodium citrate in dried green vegeta-bles anywhere in the Lioutas patent. Second, Lioutas does not disclose a working example or examples illustrating use of the citric acid/sodium citrate buffer system. Third, in setting forth citric acid/sodium citrate among a number of preferred alkaline buffer systems in Table 2 (col. 9, lines 15 through 25), Lioutas does not indicate the relative proportion of citric acid or sodium citrate in the system. Considering the Lioutas patent in its entirety, we find that Lioutas does not describe quick cooking dehydrated vegetable pieces having incorporated therein sodium citrate in the amounts recited in claims 1 though 5 on appeal.

[2]Sodium citrate is a species within the genus "alkali metal carboxylate" recited in the appealed claims.

In the final rejection (paper no. 8), the examiner postulates that (1) if the maximum amount of alkaline buffer system (3.0%) is used; and (2) if the minimum amounts of all remaining solutes are used; and (3) if the buffer system is

citric acid/sodium citrate, then inevitably the Lioutas process will produce dried green vegetables having incorporated therein sodium citrate in the amounts recited in claims 1 through 5. See the examiner's calculations in paper no. 8, pages 3 and 4. Appellants roundly criticize the basis of those calculations in the appeal brief and, in the examiner's answer, the examiner changes direction. Setting forth new postulates and new calculations, the examiner again concludes that the Lioutas process will produce dried green vegetables having incorporated therein sodium citrate in the claimed amounts (examiner's answer, pages 6 and 7). On reflection, we believe that the examiner relies on too many postulates, too many calculations, and too much speculation to here support a rejection under 35 USC § 102. In our judgment, Lioutas does not clearly and unequivocally describe the

subject matter defined in claims 1 through 5 including quick cooking dehydrated vegetable pieces having incorporated therein alkali metal carboxylate at a concentration of 1 to 4% by weight.

The examiner's rejection of claims 1 through 5 under 35 USC § 102(b) as anticipated by Lioutas is reversed.

35 USC § 103

We have carefully considered the examiner's rejection of claims 1 through 9 and 14 through 17 under 35 USC § 103 as unpatentable over the combined disclosures of Lioutas, Lewis, and Bevan. We think it clear that neither Lewis nor Bevan cure the deficiency of Lioutas which has been discussed above in conjunction with the rejection under 35 USC § 102.

That is, even if Lioutas, Lewis, and Bevan were combined in the manner proposed by the examiner, the combination would not have led a person having ordinary skill in the art to the claimed product or process of making that product where alkali metal carboxylate is present at a concentration of 1 to 4 percent by weight. The proposed modification of Lioutas, per

the teachings of Lewis and Bevan, is insufficient to arrive at the claimed subject matter. Accordingly, the rejection under 35 USC § 103 is also reversed.

Conclusion

In conclusion, for the reasons set forth in the body of this opinion, we do not sustain the rejection of claims 1 through 5 under 35 USC § 102(b) as anticipated by Lioutas. Nor do we

sustain the rejection of claims 1 through 9 and 14 through 17 under 35 USC § 103 as unpatentable over the combined disclosures of Lioutas, Lewis, and Bevan.

The examiner's decision is reversed.

REVERSED

SHERMAN D. WINTERS)
Administrative Patent Judge)
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) BOARD OF PATENT
WILLIAM F. SMITH) APPEALS AND

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